

MEMORANDUM OF LAW

DATE: January 13, 1993

TO: Angeles Leira, Legislative Specialist

FROM: City Attorney

SUBJECT: Conflict of Interest Implications in Third Party
Agreements

In a meeting of January 7, 1993, you requested that the City Attorney provide you with an analysis of opinions from the Fair Political Practices Commission ("FPPC") concerning possible conflict of interest implications in third-party agreements. For purposes of this memorandum, a "third-party agreement" is generally a joint written agreement between a state or local governmental entity (referred to here as "City"), a developer-applicant and a consultant hired to prepare a technical report, such as an environmental impact report ("EIR"). While the City would hire and supervise the work of the consultant, the developer would pay the costs, including the costs of City staff necessary to carry out and monitor the project.

In addition to the information provided below, I am attaching a Report to the Honorable Mayor and City Council, dated February 5, 1992, entitled, "Three-Party Agreements for the Preparation of Environmental Impact Reports." That Report discusses the legality of three-party agreements in general, and provides some additional insight into the reasoning of the FPPC.

Analysis

On November 7, 1990, the FPPC issued a "closure letter" by its Enforcement Division regarding an enforcement action against the Folsom, California, City Council (FPPC No. 78-242). While a closure letter is not an "opinion letter" and cannot be relied upon for formal guidance (see Section 83114, FPPC Regulation 18329), it does provide some insight into the reasoning of the FPPC.

In the Folsom action, a developer paid money into a specific city account to be used to pay the costs of processing an application through the city's Planning Department, including the hiring of consultants who would work specifically on that project.

The FPPC indicated that as consultants to state and local governmental agencies are "public officials" according to the Political Reform Act of 1974 (codified as California Government Code section 81000 et seq.; see in particular Government Code section 82048), and that "the consultants were being directly paid by the developer to make governmental decisions affected by the developer's project . . . the developer thus was the true 'source of income' to the consultants." Egan Advice Letter, No. I-91-111 (issued September 23, 1991).

This "source of income" concern goes to the heart of the Political Reform Act of 1974.

Public Officials, whether
elected or appointed, should perform
their duties in an impartial manner,
free from bias caused by their own
financial interests or financial
interests of persons who have
supported them.

California Government Code section 81001(b).

Conclusion

The concern is that with the developers paying the consultants (regardless of the role of the governmental agency in the transaction), the consultants may be biased by their financial interest in having the developer continue to pay them for the work being done.

Please contact me if you need any additional information, or have any questions.

JOHN W. WITT, City Attorney

By

Allisyn L. Thomas

Deputy City Attorney

ALT:lc:048x820(x043.2)

Attachment

ML-93-6

TOP

TOP